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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: OCT 06 2009

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner claims to provide software development and consulting services. It seeks to permanently employ the beneficiary in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by 8 C.F.R. § 204.5(k)(4), the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the Department of Labor (DOL).

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees.[1] In order to obtain classification in this employment-based preference category, the labor certification must require a member of the professions holding an advanced degree. *See* 8 C.F.R. § 204.5(k)(4).

The director denied the petition on April 27, 2007, because the labor certification did not require a member of the professions holding an advanced degree. The petitioner appealed the decision on May 21, 2007. On appeal, counsel concedes that the labor certification "does not demonstrate that the occupation requires a professional." Counsel instead requests approval of the petition "in the EB-3 professional category."[2]

The petitioner initially requested classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Act. Counsel now attempts to change the requested classification to that of a professional pursuant to section 203(b)(3) of the Act. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to U.S. Citizenship and Immigration Services requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this case, the appropriate remedy would be for the petitioner to file a new petition on behalf of the beneficiary with the proper fee and required documentation.

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[1]There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

[2]Counsel also states that "[w]e are concerned that this case was denied without the customary issuance of a Request for Evidence (RFE) and without allowing the Petitioner an opportunity to resolve any of USCIS's concerns." The regulation at 8 C.F.R. § 103.2(b)(8) states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. In the instant case, as explained herein, the denial was appropriate.

The evidence submitted does not establish that the labor certification requires a member of the professions holding an advanced degree, and the appeal must therefore be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.